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NO. 84-1719

in the Supreme Court of the United States

OCTOBER TERM 1984

MARK H. FELDMAN,

Petitioner,

v.

JACKSON MEMORIAL HOSPITAL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Feldman received the trial court's Final Judgment within days of its entry, but he overlooked and ignored it, and he failed to read it. He let his appeal time expire. Petitioner now seeks relief from his own negligence.

The sole question presented for review is:

> Whether an appellant has any excuse or cause under any Rule for failing to timely appeal where a copy of the final appealable order was mailed to and received by the appellant within days of its entry, well within the time of appeal, merely because the appellant failed to read his mail and where absolutely no other extenuating circumstances exist.[1]

[1]Response to or restatement of Petitioner's five purported issues presented for review is pretermitted because each ignores the fact that this Petitioner had actual notice of entry of judgment within days of its entry.

PARTIES

Respondents are 17 private or public hospitals and 49 doctors. Their names, and the names of corporate parents and affiliates are listed at pp. ii-viii of the Brief of Appellees before the United States Court of Appeals for the Eleventh Circuit, and a partial listing thereof is contained in Petitioner's Petition for Writ of Certiorari, at pp. iv-vi. While Rule 28(i) would appear to eliminate the need for listing the parties anew, the same are set out in the footnote below.[2]

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[2]Marshall Hall, M.D.; Modern Health Care Services, Inc., f/k/a North Miami General Hospital, Inc.; Melvin G. Drucker, M.D.; Lloyd A. Moriber, M.D.; Little Arch Creek Properties, Inc.; Immediate Medical Care, Inc.; NMGH Medical Staff Building, Inc.; North Miami Medical Offices, Inc.; Modern Management Methods, Inc.; Health Care Resources, Inc; Little Arch Creek Leasing, Inc.; Republic Health Corporation; Orthopedics Associates, M.D., P.A. (a professional association whose members are Melvyn G. Drucker, M.D., Joel Dennis, M.D., Kenneth Hodor, M.D., Robert Ennis, M.D., and Ira Posner, M.D.); Jackson Memorial Hospital; William W. Cleveland, M.D.; Robert Zeppa, M.D.; Newton C. McCollough, M.D.; Augusto Sarmiento, M.D.; Wallace Miller, M.D.; Henry Beller, M.D.; Allan B. Cohen, M.D.; Michael Gurvey, M.D.; Marshall Hall, M.D.; Thomas Samartino, M.D.; Mario Stone, M.D.; Salvador Ramirez, M.D.; Claude Holmes, M.D.; Arthur Pearl, M.D.; Samuel Turek, M.D.; William Terheyden, M.D.; D. Harvey Grable, M.D.; Ledford Gregory, M.D.; Edward Cullipher, M.D.; Associated Doctor's Hospital, Inc. d/b/a Miami General Hospital, f/k/a International Hospital; Salvador Ramirez, M.D.; South Broward Hospital District, a public body, owner and operator of Memorial Hospital of Hollywood; Paul S. Baxt, M.D., and George Crane, M.D., both formerly of Crane, Niles and Baxt, M.D., Orthopedics Associates, P.A.; now of Crane, Baxt & Reich, M.D. Orthopedics Associates, P.A.; Robert I. Niles, M.D.; Robert I. Niles, M.D., P.A.; A.P. Petti, M.D.; A.P. Petti, M.D., P.A., Larry Rosenbaum, M.D.; Larry Rosenbaum, M.D., P.A.; Harry Fisher, M.D.; Robert L. Berger, M.D.; Robert L.

(Footnote 2 Continued)

Berger, M.D., P.A.; North Ridge General Hospital, Inc.; North Beach Medical Center, Inc., d/b/a North Beach Medical Center; HCA Health Services of Florida, Inc., a wholly owned subsidiary of Health Services Acquisition Corp., a subsidiary of General Health Services, Inc., and Hospital Corporation of America; Sidney Cole, M.D.; Community Hospital of Humana, Inc., d/b/a Humana Hospital Cypress, f/k/a Cypress Community Hospital; Humana Florida, Inc., d/b/a Humana Hospital Bennett; Doctor's General Hospital; Rufus Broadaway, M.D.; Broadaway, Kimrad, Schild & Katzman, P.A. d/b/a The Surgical Group of Miami; Cedars Medical Center, Inc.; Harold Glick, M.D.; Marshall Hall, M.D.; Eugene Komrad, M.D.; Sheldon Marne, D.P.M.; Mt. Sinai Hospital of Greater Miami, Inc.; Salvadore M. Ramirez, M.D.; Edward Rockwood, D.O.; Lester A. Russin, M.D.; Mario M. Stone, M.D.: Stone Orthopedic Associates, P.A.; Alvin E. Tobis, M.D.; Samuel Turek, M.D.; Charles Weiss, M.D.; North Broward Hospital District, a public body, owner and operator of North Broward Hospital, Broward General Medical Center, and Imperial Point Hospital; William A. Terheyden, M.D.; Gary Krulik, M.D.; Robert A. Bronfman, M.D.; Frank Stein, M.D.; Melvin Drucker, M.D.; Peter Sciaretta, M.D.; Lloyd A. Moriber, M.D.; Frank A. Stuard, M.D.; Maxwell Dauer; Rever Dauer; Dr. Edward Dauer; Roger Dauer; Holy Cross Hospital; Gateway Hospital Corp., East, d/b/a Pembroke Pines General Hospital, Nile Lestrange, M.D.; Wylie Scott, M.D.; Robert A. Bronfman, M.D.; Martin G. Medelssohn, M.D.; Niel Beinhaker, M.D.; U.S. Health Corporation; Lake Hospital Corporation, d/b/a Lake Community Hospital (Florida); Heard Community Hospital (Georgia); Jenkins Community Hospital (Kentucky); D.E. Jackson Memorial Hospital (Alabama); Community Hospital of Calhoun County (Mississippi); Community Hospital of Courtland (Alabama); North Broward Hospital District, a public body, owner and operator of Broward General Medical Center, North Broward Medical Center, and Imperial Point Medical Center; Bronson J. McNierney, M.D.; J. Gable, M.D.; George F. Rahilly, M.D.; Peter Sciaretta, M.D.: Nile Lestrange, M.D.; Wylie Scott, M.D.

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JURISDICTION

Jurisdiction is sought to be invoked pursuant to 28 U.S.C. 1254(1). The Eleventh Circuit Court of Appeals affirmed the judgment below on January 11, 1985 [P.App.F]; hearing *en banc* was earlier denied on December 17, 1984 [P.App.E]. The order appealed (Order on Motion to Vacate Judgment) was entered by the trial court on December 5, 1983 [P.App.D]. While other reported and unreported decisions are cited by Respondent, none of them is now before this Court.

No. 84-1719

In the Supreme Court of the United States

OCTOBER TERM 1984

MARK H. FELDMAN,

Petitioner,

v.

JACKSON MEMORIAL HOSPITAL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner Mark H. Feldman did not timely appeal the trial Court's Final Judgment of September 19, 1983—through no fault, misapprehension, or error except

his own. While the issues presented by Petitioner Feldman are cast in terms which overlook this important fact, the fact remains. Petitioner (and all other parties) received the Final Judgment in ample time for Petitioner to appeal within 30 days. This is not a case of Court, Clerk or clerical error; this is not a case of non-receipt of a final appealable order; this is not a case of "unique" or "extraordinary" circumstances; this is not a case of misguidance or overreaching by any party or the court; this is not a case of anything except Petitioner's own lack of diligence and inattention to the matter.

None of the relevant considerations governing review on certiorari, as set forth in this Court's Rule 17, supports the grant of the requested writ. The decision of the Court of Appeals, like that of the trial Court, is wholly consistent—and is not in conflict—with the decisions of this Court and other Courts of Appeals. Nor does the decision below merit review by this Court for any other reason. Indeed, all that is involved here is one simple fact and the application of well-established legal principles and Court rules to the specific record in this case.

STATEMENT OF THE CASE

After five weeks of trial before a jury, this multi-defendant action, which was first filed in February, 1979, was ended when the trial judge granted all defendants' motions for directed verdict.[3] The motion was granted in open court on July 14, 1983. On July 18, 1983, the court entered its informal written announcement of that decision [P.App.1; R.28].[4] "A final appealable order will be issued separately at a later date," promised the Court.

On September 19, 1983, the promise was fulfilled. The trial court entered it 19 page Memorandum Decision and Order Granting Motions for Directed Verdict [R.29;

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[3]The directed verdict and resultant final judgment are not before this Court. It should be noted, however, that the Court gave Petitioner "a great deal of latitude in presenting his evidence," the trial Court being mindful that Feldman was representing himself [R.29; P.App.B6, B27]. That latitude is witnessed by the five weeks of trial alone. It should also be noted that Feldman was and is no novice *pro se* litigant; this was not his first *pro se* case. Indeed, he received a substantial verdict in an earlier case. The trial court recognized his abilities stating that

> Plaintiff has represented himself quite capably during the course of this litigation. He became conversant with civil procedure, the rules of evidence, and the substantive law. . . . His diligent study and work gave him skills, knowledge, and practical understanding far beyond that possessed by most *pro se* litigants. . . . In short, plaintiff is as capable as any lay person and possibly as capable as many lawyers . . . [R.125-126; P.App.D10-11].

[4]References to the Record will be made by use of "R." Petitioner's Appendix is referred to as "P.App.;" Respondents' Appendix is referred to as "R.App."

P.App.B], reported at 571 F.Supp. 1000 (S.D. Fla. 1983). On the same date, the Final Judgment on Directed Verdict was also entered [R.48; P.App.C].[5] The Memorandum Decision stated twice that the Final Judgment was separately entered, advising once that it accompanied the Memorandum Decision [P.App.B24, B26, n.3].

The Court mailed copies of both the Memorandum Decision and the Final Judgment on September 19, 1983 — the same day they were entered [R.43, 49; P.App. B25, C3]. All counsel of record — and Petitioner Feldman — received both within days of their mailing. At that point, Petitioner Feldman had approximately 28 days within which to file his Notice of Appeal under Rule 4(a)(1), Fed.R.App.P. He did not appeal. Nor did he file any motion tolling the time for appeal. Inexplicably, Petitioner apparently did not carefully read the Memorandum Decision and totally overlooked or ignored the Final Judgment which he had undeniably received. His appeal time expired. The 30 additional days permitted by Rule 4(a)(5), Fed.R.App.P., upon a showing of excusable neglect or good cause, likewise expired.

Petitioner Feldman realized that he had missed his appeal time in late November, 1983. He did not however, at that point, concede that his appeal time was missed because of his own sole neglect. This recognition came later. On November 29, 1983, he filed a Motion for Emergency Hearing accompanied by a

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[5]The Final Judgment was separately entered pursuant to the mandate of Rule 58, Fed.R.Civ.P. ("Every judgment shall be set forth on a separate document").

Motion to Vacate and Re-enter Final Judgment [R.App. 8; R.56, 58].

Both Motions then charged that Petitioner had not received the September 19 Final Judgment and that Petitioner learned of its entry by happenstance in a conversation with one of Respondents' counsel. The Motion to Vacate also charged that the Court's docket sheet was missing.

The Motion to Vacate requested Rule 60(b)(1) and (b)(6), Fed.R.Civ.P., relief.

The trial Court held the requested emergency hearing on December 2, 1983 [R.Vol.II; R.App. 2]. The evening before, Petitioner "found" his copy of the Final Judgment among his papers at his home. He had it all along. And with commendable candor he so advised the Court and all counsel.[6]

Petitioner's December 2, 1983, Affidavit states that

> [while] preparing for the hearing before this Court . . . plaintiff found the paper (the Court's order) . . . among his papers and copies of cases used in the trial of this case [R.118; R.App. 8].

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[6]With something less than commendable candor, Petitioner's questions presented for review, and indeed his entire Petition, evades, avoids, and virtually ignores the plain and simple fact that Petitioner had actual notice of the Final Judgment in more than sufficient time to timely appeal.

At the December hearing upon Petitioner's Rule 60 Motion to Vacate, Petitioner stated likewise:

> MR. FELDMAN: Your honor, for the record, I would like to state that pursuant to my telephone call to your Honor's clerk this morning and to Ms. Dunaj and Mr. Kelso, in preparation for this hearing I did, in fact, find the final judgment mixed in with my papers at home last night.
>
> I have, in fact, been searching, coming to the courthouse seeking a judgment *which I had and did not know I had it.*
>
> * * * *
>
> MR. FELDMAN: As I stated, *I am not questioning the fact it was mailed.*
>
> * * * *
>
> MR. FELDMAN: *I had actual notice. I did receive the memorandum and I did receive the final order.*
>
> * * * *
>
> MR. FELDMAN: *[I] did receive it and the error is mine, and I stand responsible for it* . . .

[R.Vol.II; R.App. 2; emphasis supplied; *see also*, Petitioner's December 2 affidavit, R.App.12].

Given these markedly clear facts, the trial Court denied Petitioner Feldman's Motion to Vacate and Re-enter Judgment [R.120; P.App.D].

The Eleventh Circuit Court of Appeals affirmed that judgment on January 11, 1985, holding that "Feldman's failure to read the district court's judgment and his subsequent misplacing of the judgment does not amount to a mitigating circumstance or a special hardship." [P.App.F4].

This Petition for Writ of Certiorari ensued.[7]

ARGUMENT

Petitioner has demonstrated no special or important reasons for granting this discretionary Petition for Writ of Certiorari. The decision of the Eleventh Circuit Court of Appeals conflicts not with any decisions of this Court or other Federal Courts of Appeals on the same matter. Neither does its decision depart at all from accepted judicial proceedings, and no important questions of Federal law is herein presented.

Try as Petitioner may, he cannot state an acceptable question properly presented for review in light of the crystal clear fact that this is but an effort to find excuse for Petitioner's own mere failure to timely appeal.

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[7]Petitioner's initial Petition was rejected by the Clerk because it was over the size limits allowed and because Petitioner failed to pay the docketing fee. The Petition resubmitted and now before this Court is substantially expanded from the initial submission.

The fact that a Petitioner fails to read his own mail hardly qualifies as a fact to which this already overburdened Court should give its attention.

On these facts, no conflict (and no monumental policy issue) exists.

Two rules of procedure are pertinent. Rule 4(a)(1) Fed.R.App.P., provides that appeals of right from a district court must be filed within 30 days of entry of judgment. This is modified by subsection (5), which allows an extension of time of another 30 days upon a showing of excusable neglect or a good cause. Here, Petitioner Feldman fell outside both the initial and additional 30 day time periods at the point when he asked for a vacation of the September 19 Final Judgment.

Rule 60(b), Fed.R.Civ.P., was, thus, Petitioner's only remaining, albiet ill-founded, avenue of relief. It allows relief from a judgment or order because of "(1) mistake, inadvertence, surprise, or excusable neglect," or "(b) any other reason justifying relief from the operation of the judgment,"[8] the two subsections cited by Petitioner Feldman.

The facts, however, do not fit—neither under rule 60(b), Fed.R.Civ.P., nor under any one of the purported conflict cases relied upon by Petitioner.

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[8]Rule 60(b) comes into play most often when a party does not receive notice of entry of a judgment. It has been utilized to ameliorate the harshness of Rule 77(d), Fed.R.Civ.P., which provides clearly that "lack of notice of the entry by the Clerk does not affect the time to appeal or relieve or authorize the Court to relieve a party for failure to appeal within the time allowed as permitted in Rule 4(a) . . . ."

The cases relied upon by Petitioner, and their progeny, fall into two distinct factual categories: (a) cases granting or denying relief from judgment when either the party received no notice of the final judgment or was misled by the Court into not seeking information about its entry, and (b) cases concerning void judgments coupled with factual inability to appeal on time. *Klapprott v. United States*, 335 U.S. 601 (1949), falls into this latter category. Klapprott was denaturalized by default judgment, in the absence of an evidentiary hearing; he was arrested and jailed before he could answer or obtain counsel to answer the denaturalization complaint; the F.B.I. confiscated his handwritten answer and letter to the ACLU. Nine years later the United States attorney filed suit to vacate the earlier default denaturalization judgment. *Klapprott, supra*, presented the kind of unjust scenario for which Rule 60(b)'s provisos were designed. This Court reversed and remanded, holding that it was "an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part." *Klapprott, supra* at 613.

This is in sharp contrast to Petitioner Feldman's situation. Feldman's failure to merely read his mail cannot be fairly or logically classified as anything but inexcusable "neglect on his part."

In similar contrast are the first category of relief from judgment decisions allegedly, but not actually, in conflict with the decision below. In *Thompson v. Immigration and Naturalization Service*, 375 U.S. 385 (1964), the petitioner filed an untimely post-trial motion. The Government raised no objection to its untimeliness. More significantly, the district court explicitly stated that the motion was made "in ample time."

Such circumstances this Court found to be Rule 60(b), "unique;" the case was remanded to the Circuit Court of Appeals. This Court did likewise in *Harris Truck Lines v. Cherry Meat Packers*, 371 U.S. 283 (1952); although, in *Harris*, *supra*, the appeal was filed within the second 30-day period allowed under Rule 4(a)(5), Fed.R.App.P., after the trial court found excusable neglect because the solely responsible person for all appellant corporate decisions did not learn of the final judgment until after the 30-day appeal time expired. *Harris*, thus, might also be said to be a case of departure from the accepted and usual course of judicial proceedings. *See* Rule 17.

The *Klapprott/Harris/Thompson* triology presented by this Petitioner are factually inapposite, as are the multitude of decisions following this set of cases, including *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1074), *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983), and *Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir. 1984). In all three of these latter cases and, indeed, in the case relied upon by the Eleventh Circuit herein,[9] the district court clerk failed to give the parties notice of the entry of final judgment—a critical fact simply not present for this Petitioner's use. Petitioner himself concedes that he meets only some of the elements of these foregoing cases. And he consistently overlooks the one pertinent and plain fact that he had actual notice—not upon his "chance" talk with Respondents' counsel in late November but upon his admitted receipt of the judgment in September. This is not a "close call" case, as Petitioner would like it to be seen.

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[9]*Fidelity & Deposit Co. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).

The class of cases into which this one most nearly fits are those where the Petitioner was in full possession of the facts but either carelessly or knowingly waived his right to appeal. *Ackermann v. United States*, 340 U.S. 209 (1950); *Polites v. United States*, 364 U.S. 426 (1960); *Nichols-Morris Corp. v. Morris*, 279 F.2d 81 (2d Cir. 1960) (timely actual and constructive notice of entry of judgment overlooked by firm managing attorney held to be "one of those careless omissions to which everyone is indeed subject but which does not excuse inaction"); *Delzona Corp. v. Sacks*, 265 F.2d 157 (3d Cir. 1959); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729 (9th Cir. 1971) (motion to vacate filed five months after entry of judgment denied); *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir. 1977).

The closing words and the rejection of the appellant's arguments in *International Controls Corp, supra*, at 671, apply with equal vigor to this ill-founded Petition:

> In support of its argument, appellant points to certain equitable factors in its favor, including the absence of prejudice to appellee if an appeal from the judgment were now allowed, the length of the trial proceedings, the substantial monies at stake, the virtual certainty that appellant intended to appeal from the judgment—[citation omitted]. Appellant ignores, however, equally compelling factors that mitigate against giving it another opportunity to appeal. Most importantly, the district court found that appellant had actual notice of the entry of judgment five days before the time for appeal expired and had constructive notice at least some twenty days in advance. Appellant does not here challenge these findings, which led

the district court to conclude the appellant's failure to file a timely appeal was not excusable. Appellant's situation thus contrasts sharply with that in the case it cites with regard to the above-listed equitable factors in its favor. In *Fidelity & Deposit Co. v. Usaform Hail Pool, Inc., supra*, 523 F.2d at 751, a judgment was vacated under Rule 60(b)(6) because no party knew of the entry of judgment at the time it was entered and because counsel acted diligently in seeking to learn of the judgment. *Accord, Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 163 U.S.App.D.C. 140, 500 F.2d 808, 809-10 (1974).

These same arguments of Petitioner Feldman herein must likewise be rejected.[10]

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[10]Petitioner tries to raise yet another non-conflict side issue — whether an "intervening appellate decision is a 'mistake' justifying relief under Rule 60(b) (1)." In addition to the fact that only one of the two supposed "intervening" decisions was in existence when this case was before the district court, having been decided on the very day Final Judgment was entered below (*Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983)), and in addition to the fact that *Wilk*, supra, is an erroneous jury instruction decision, with little or no applicability herein, is the clear law — cited by Petitioner — that supposed intervening case decisions merit "mistake" consideration under Rule 60(b) (1) only "when relief from judgment is sought within the normal time for taking an appeal." *Barrier v. Beaver*, 712 F.2d 231 (6th Cir. 1964). *Accord, Schildhaus v. Moe*, 335 F.2d 529 (2nd Cir. 1964). Furthermore, Petitioner raised neither case now cited by him in his Motion to Vacate and neither is pertinent, in any event. One, of course, was not decided until the next year (*Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984)); the other, *Wilk*, was merely mentioned in a string citation in Petitioner's memorandum opposing the order taxing costs [R.89]. At best, this question for review, thus, improperly tries to bring to this Court the directed verdict from which Petitioner failed to timely appeal.

CONCLUSION

"A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup.Ct.R.17. This is not such a case. The decision of the Eleventh Circuit was fully consistent with established legal principles. Petitioner's own words merit repeating; "I did receive it and the error is mine, and I stand responsible for it." [R. Vol. II; R. App. 2] Review is unwarranted.

Respectfully submitted,

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Dated: May 31, 1985

Appendix

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MOTION TO VACATE AND RE-ENTER FINAL JUDGMENT AND AFFIDAVIT OF NOVEMBER 29, 1983 8

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MARK FELDMAN,

Plaintiffs,

vs.

JACKSON MEMORIAL HOSPITAL, et al.,

Defendants.

Docket N. 79-758-Civ-JWK

Miami, Florida
December 2, 1983

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES W. KEHOE

TRANSCRIPT ORDERED BY	MARK FELDMAN
APPEARANCES:	
For the Plaintiff:	MARK FELDMAN, PRO SE
For the Defendants:	JOHN McCLURE, ESQ. JOHN R. KELSO, ESQ. SHERRYLL DUNAJ, ESQ. ROBERT BLAKE, ESQ.
Court Reporter:	Paul C. Haferling 301 North Miami Avenue Miami, Florida 33128

[Call to order of the court.]

THE COURT: We are here on Mr. Feldman's motion to vacate and re-enter the final judgment.

Mr. Feldman, do you care to proceed?

MR. FELDMAN: Your Honor, for the record, I would like to state that pursuant to my telephone call to your Honor's clerk this morning and to Ms. Dunaj and Mr. Kelso, in preparation for this hearing I did, in fact, find the final judgment mixed with my papers at home last night.

I have, in fact, been searching, coming to the courthouse seeking a judgment which I had and did not know I had it.

THE COURT: I think the record should reflect that the only way you would have had that would have been with my staff, what my staff sent, unless somebody wants to place them under oath.

My staff has advised me that the order that we are discussing, together with the memorandum decision, was all administrative work of mailing. It was completed on the 19th day of October; you, therefore, would have received it several days thereafter.

MR. McCLURE: September.

THE COURT: September. Excuse me.

MR. FELDMAN: As I stated, I am not questioning the fact it was mailed.

THE COURT: That sort of changes the ballgame.

MR. FELDMAN: I am aware.

THE COURT: From what the original emergencies and everything that are here, so all I am saying to you is that the record would no reflect that here we go back to that GSA calendar, which would reflect that the 19th of September was on a Monday, and it was probably mailed that evening or the next morning, so you would have had sometime during the week of the 19th.

And so that the record apparently reflects, and I want to see if you contest this, that you had actual notice of the judgment as of some time shortly after the 19th of September?

MR. FELDMAN: I had actual notice. I did receive the memorandum and I did receive the final order. However, the documents were not together.

I want the record to clearly reflect, sir, that when this emergency motion was filed, as I told Jim, I did not realize that I had that final judgment.

THE COURT: Your point being, Doctor, that it had to be in the same envelope.

MR. FELDMAN: I do not dispute that.

THE COURT: That is all I am saying.

The record would reflect that you had actual knowledge from some time shortly after, whether you got it or whether you noticed it was there or whether it

was not there whether it was attached or not attached, my office sent you a courtesy copy and, therefore, I assume you had or should have had actual knowledge as of some time shortly after the 19th of September.

MR. FELDMAN: I do not dispute that.

* * * *

THE COURT: It may have some bearing, if your contention is that the Clerk took it and hung it on the wall somewhere, you could not find it, if that, in effect, kept if from you so you could not look at it, the docket sheet was missing so you could not look at it.

MR. FELDMAN: That is not my contention.

* * * *

Q You found your copy of this document, two pages, entitled Final Judgment on Directed Verdict yesterday evening?

A [by DR. FELDMAN] Yes.

Q In your file?

A That is true.

Q At your home?

A That is true.

Q And it's been there since you got it in the mail from Judge Kehoe's office?

A I am sure it has.

Q You just never saw it?

A That is correct.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MARK H. FELDMAN, PRO SE

PLAINTIFF

VS

JACKSON MEMORIAL HOSPITAL, ET AL

DEFENDANTS

CASE NO. 79-758-CIV-JWK

MOTION FOR EMERGENCY HEARING

Plaintiff pursuant to FRCP, Local Rule 9 (L) requests an immediate hearing on his Motion to Vacate and Re-enter Final Judgment attached. The time limit has run for plaintiff to Appeal the Court's Final Judgment on Directed Verdict. Order entered on 9/19/83 was not received by plaintiff and plaintiff respectfully submits the attached Motion and circumstances contained therein warrant the requested hearing.

Respectfully requested,

7160 N.W. 45th Ct., Lauderhill, Fla., 33319 741-3792, 949-5248

I certify a true copy of this Motion was sent to all Counsel of record at the trial of this case, this Nov. 29, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MARK H. FELDMAN, PRO SE

PLAINTIFF

VS

JACKSON MEMORIAL HOSPITAL, ET AL

DEFENDANTS

CASE NO. 79-758 CIV JWK

MOTION TO VACATE AND RE ENTER

FINAL JUDGMENT

Plaintiff asks this Court to Vacate the Final Judgment on Directed Verdict entered Sept. 19, 1983 and re-enter the Judgment as the Final Appealable Order and in support of such Motion says:

1. FRCP 60 (b) (1) and (b) (6) allows the requested relief.

2. Plaintiff received this Court's Memorandum Decision and Order Granting Motions for Directed Verdict.

3. The separate document Final Judgment On Directed Verdict was not received by plaintiff.

4. Plaintiff, on at least two occasions following the trial of this case, visited the Clerk's office to review

the Court File to review the trial transcript (which was not in the Court file) and the Docket Sheet which was missing from the Clerk's office and remains missing to the present day.

5. Plaintiff discovered the Court had entered final judgment only by accident in discussing the plaintiff's intended Motion to Stay the Judgment on Costs and Plaintiff's intended Motion to Alter or Amend the Judgment on Costs with Mr. Kelso, one of the defendant's Counsel on 11/28/83 at approx. 1:15 PM.

6. Mr. Kelso informed plaintiff the final judgment on the directed verdict had been entered, which was confirmed by your Honor's Clerk Jim when plaintiff visited your Honor's Chambers on the afternoon of 11/28/83.

7. Plaintiff again attempted to review the Docket Sheet in the Clerk's office. It remains missing as your Honor's Law Clerk again discovered as plaintiff and law clerk attempted to find it.

8. This Court was confronted with the same problem when defendants sought vacation of default judgment against defendants in 1981.

a. 11/3/81 order giving defendants 30 days to answer plaintiff's amended complaint, which plaintiff received.

b. Default against defendants entered 1/7/82.

c. Defendants asserted they did not receive the Court's Order giving them 30 days to answer the Amended Complaint.

d. 3/9/82 Order setting aside default.

9. Plaintiff made a diligent effort to obtain the Court's Order by attempting to see the docket sheet and visiting the Court's Chambers before and after your Honor went on vacation in an effort to find out when the Final Order would be entered so that plaintiff could timely perfect his appeal.

10. *Buckeye Cellulose Corp. v. Braggs Electric Const. Co.*, 569 F2d 1036 (CA 8th, 1978) and *Expeditions Unlimited Aquatic Enterprises Inc. v. Smithsonian Institute*, 500 F2d 808, (CA DC, 1974) and *Fidelity Deposit Co. of Md. v. Usaform Hail Pool, Inc.* 523 F2d 744, 21 FR Ser2d 271, *cert. denied* 96 S Ct 1725 support the plaintiff's position.

11. Defendants will not be prejudiced by grant of the Motion.

Wherefore plaintiffs prays this Court will enter an Order Vacating and Reentering Judgment so that a timely appeal may be taken.

Respectfully requested

7160 NW 45th Ct., Lauderhill, Fla., 33319, 741-3792, 949-5248

A true copy sent to all trial Counsel 11/29/83

GENERAL AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

Before the undersigned, an officer duly of commissioned by laws of Florida, on this 29 day of Nov. 1983, personally appeared Mark H. Feidman who having been first duly sworn depose . . . and say . . .:

1. On at least 2 occasions after the trial of this case I visited Judges Kehoe's Chambers in an effort to obtain the final appealable Order in This case.

2. In addition, I visited the Clerk's office in an attempt to see the docket and trial transcript in this case.

3. In every instance the docket sheet was missing from the clerk's files and remains missing to this day.

4. I did not get a copy of the Final Judgment On Directed Verdict in this case.

5. I intended to appeal the decision of this Court and that intention was made known to defense counsel on announcement of the Court's decision at trial.

SWORN TO AND SUBSCRIBED TO BEFORE ME ON THIS ____ DAY OF NOV. 1983.

SEAL

AFFIDAVIT

COUNTY OF DADE, MARK H. FELDMAN APPEARED BEFORE ME ON THIS

Dec. 2, 1983 and says:

1. His affidavit of Nov. 29, 1983 was made in good faith.

2. While preparing for the Hearing before this Court to be held on Fri. Dec. 2, 1983 rather than Mon. Dec. 5, 1983, plaintiff found the paper, (the Court's Order) referred to in item 4 of the Nov. 29, 1983 affidavit, among his papers and copies of cases used in the trial of this case.

3. All other statements in the Nov. 29, 1983 Affidavit are as stated.

Sworn to and Subscribed to before me on this Dec. 2, 1983